ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Memorandum

on the draft

Law Relating to the Protection of Whistleblowers of Rwanda

March 2011

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About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme operates the Media Law Analysis Unit which publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive law reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/publications/law/legal-analyses.html.

If you would like to discuss this Memorandum further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

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- The term 'institution' should be defined broadly in the Whistleblower Law, and should include any organisation that employs persons, regardless of whether it is incorporated.
- The term 'partnership' should be defined broadly in the Whistleblower Law, and should include all forms of substantial cooperation between two institutions, whether or not it is based on a contract or required by law.
- The Whistleblower Law should apply to persons who are outside an employer-employee relationship but are still at risk of retribution when making public interest disclosures, such former employees, volunteers, students, independent consultants and family members of employees.
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- When an employee presents a disclosure in oral form, the public official who reduces it to writing should be required to ascertain that the employee agrees with the summary.
- The public employee appointed to receive disclosures should be required to acknowledge receipt of a disclosure in writing.
- The Whistleblower Law should require private sector institutions to appoint a person to receive disclosures, or should require them to put their own whistleblowing procedures in place. An exception can be made for small organisations.
- The Whistleblower Law should recognise the possibility of making an external disclosure to one or more public bodies in cases where an internal disclosure is not an adequate solution.
- The Whistleblower Law should further recognise the possibility of an external disclosure to the media, as a last resort.

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- The Whistleblower Law should recognise appropriate exceptions to the duty to withhold the identity of whistleblowers.
- Whistleblowers should not be entitled to testify anonymously outside of the circumstances recognised in the ordinary law of criminal procedure. Article 17 of the Draft Law should be deleted.
- Whistleblowers should be empowered under the law to take legal action against retribution, which should be broadly defined to include all types of job sanctions, harassment, loss of status or benefits, and other detriments. The employer should carry the burden to prove that the detriment was not imposed in retaliation for the disclosure.
- The law should enable employees to seek interim relief to return to the job while their case is pending. In cases where the employee cannot realistically return to his or her job,

the law should provide that full compensation can be awarded for all lost past and future income and suffering.

Recommendations on sanctions for 'bad faith' disclosures:

- Articles 18, 19 and 20 of the Draft Law that criminalise bad faith disclosures, should be deleted.

1. INTRODUCTION

This Memorandum provides ARTICLE 19's analysis of Rwanda's draft Law Relating to the Protection of Whistleblowers (hereinafter: the Draft Law) against international standards on freedom of expression.[1] ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. We have previously published analyses of Rwanda's Law Relating to the Punishment of the Crime of Genocide Ideology[2] and the draft Law on Access to Information.[3]

ARTICLE 19 welcomes the initiative to develop a dedicated law on this subject. A limited form of whistleblower protection was previously proposed in the draft Law on Access to Information, but as we noted in our analysis of that law, whistleblower protection deserves elaboration in a freestanding law.

Despite growing international recognition of the contribution whistleblowers can make to rooting out corruption, mismanagement, poor safety practices and many other ills, the law in this area is still in its infancy, and only a small number of countries have to date enacted comprehensive legislation. Some of the most advanced laws can be found on the African continent – after South Africa set the example in 2000, Ghana and Uganda followed, enacting their whistle-blowing laws in 2006 and 2010, respectively. Rwanda thus has the opportunity to draw on experiences gained on the continent, while being a frontrunner in global terms.

Our analysis finds a number of positive aspects in the Draft Law. In particular, it will apply to all institutions, whether private or public, and sets out a simple procedure for employees in the public sector to follow when they wish to make a disclosure. The draft law offers a strong guarantee of confidentiality to whistleblowers – in some respects, we argue, even too strong.

At the same time, the proposal suffers from a number of weaknesses. These include the creation of a series of criminal offences which could see persons making 'bad faith disclosures' jailed for extensive periods – a prospect which will deter many employees from coming forward for no benefit of their own. The protections offered to whistleblowers against retribution by their bosses are not wholly convincing, and the range of subjects on which a disclosure may be made is limited.

Where possible, we have attempted to provide practical guidance on how these issues may be resolved, citing from existing legislation which represents good practice.

ARTICLE 19 hopes that the recommendations and analysis contained in the Memorandum are useful to the Rwandan legislators when reviewing the text of the Draft Law. ARTICLE 19 also stands ready to assist the Government in finalizing the text of the Law and in its implementation in practice.

[1] For the text of the Draft Whistleblower Law, see the Annex to this Memorandum.
[2] London, 2009. Available online at http://www.article19.org/pdfs/analysis/rwanda-comment-on-the-law-relating-to-the-punishment-of-the-crime-of-genocid.pdf.
[3] London, 2011. Available online at http://www.article19.org/pdfs/analysis/rwanda-note-on-draft-law-on-access-to-information.pdf.

2. ANALYSIS OF THE WHISTLEBLOWER LAW

2.1. Scope of protected disclosures

Overview

Under the Draft Law, a person will be considered a whistleblower if the person discloses information that "he/she knows, suspects or of which he/she had been informed", concerning "infractions, misconduct and maladministration" (Article 2(ii)).

The term 'infraction' is further defined as an "act or omission sanctioned by penal code and other laws", notably including corruption, money laundering, offences related to public procurement, taxes and revenues, exploitation and management of land, and the conservation, protection and promotion of the environment (Article 2(iii)). The draft law does not further define 'misconduct' and 'maladministration'. These terms normally refer to conduct which, while not criminal, is improper or inefficient. However, the French version uses the words "*les actions et les comportements illégaux*", which might be more accurately translated as "illegal actions and behaviours".

The Draft Law applies to both employees of public and private institutions (Article 3). A whistleblower may make a disclosure either regarding his or her own place of work, or regarding a partner institution (Articles 4 and 5).

Article 8 of the Draft Law makes it clear that the draft law's protections do not apply to disclosures made in bad faith. The person making the disclosure may not be motivated by "hatred, jealousy or misunderstanding" (*i.e.,* conflict) or "with intent of discrediting someone or an institution". Article 9 adds that there shall be no monetary reward – at least under this law – for whistleblowing, which should be done for patriotic reasons or for the protection of the general interest.

Analysis

When considering the scope of a whistleblowing law, three aspects are important:

1. The types of wrongdoing it applies to;
2. The bodies in respect of which a disclosure may be made; and
3. The persons entitled to make a disclosure.

The purpose of a whistleblowing law is to ensure that behaviour which undermines the effectiveness of an organisation and thereby harms the public interest can be effectively challenged and resolved. Criminal conduct, including corruption and embezzlement, is the most obvious type of behaviour which falls into this category. But non-criminal conduct may also hurt organisations and the wider public interest.

For example, when the severe acute respiratory syndrome (SARS) epidemic emerged in China in 2002, the authorities initially severely understated the seriousness of the outbreak of the new disease. A whistleblower, Dr. Jiang Yanyong, is credited with helping to contain the outbreak by alerting international media to the extent of the problem and thereby pressuring the authorities to take effective action. In Britain, public enquiries into the sinking of a passenger ferry and the crash of a commuter train[4] helped

[4] The sinking of the *Herald of Free Enterprise* on 6 March 1987 and the Clapham Junction rail crash on 12

prepare the ground for the adoption of a whistleblowing law - the Public Interest Disclosure Act 1998. The enquiries into both accidents showed that staff had been aware of poor safety practices, but had been afraid or unable to raise their concerns effectively with management.

These examples suggest that a whistleblowing law should cover a wide variety of illegal *and* legal wrongdoing, including violations of laws, rules and ethical norms, abuses, mismanagement, and failure to act against threats to public health, safety, the environment or human rights. The Rwandan draft Whistleblower Law is currently limited, however, to "infractions, misconduct and maladministration". The French text suggests that this should be read to include only unlawful conduct. While this is a good start, the usefulness of the law will be increased if its scope is expanded.

South Africa's Protected Disclosures Act provides an example of good practice in this regard. It protects employees when making disclosures which show one of the following:

a) That a criminal offence has been committed, is being committed or is likely to be committed;
b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
d) that the health or safety of an individual has been, is being or is likely to be endangered;
e) that the environment has been, is being or is likely to be damaged;
f) unfair discrimination; or
g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.[5]

Ghana's Whistleblower Act contains a similar list and adds the following:

> in a public institution there has been, there is or there is likely to be waste, misappropriation or mismanagement of public resources.[6]

We recommend expanding the scope of the Draft Law along similar lines.

Turning to the second aspect of the scope of the law – the bodies it covers – we find that the Draft Law is in line with best practice. It applies to any institution, whether private or public. Wrongdoing which undermines the public interest can occur in any kind of organisation, so it is appropriate that the scope of a whistleblowing law is not limited to the public sector (as is the case, for example, in the United States and Canada) or the private sector (as is the case in Japan). Our only comment is that the term 'institution' should be defined in the law, to avoid discussions arising after its enactment about whether particular organisations are 'institutions' in the sense of the law. The definition should be as broad as possible, and could for example extend to "any organisation that employs persons, regardless of whether it is incorporated".

The Draft Law is also relatively progressive in terms of the third and final aspect of its scope - the persons entitled to make a disclosure. The law's protection will apply not only to the employees of the organisation where the wrongdoing is occurring, but also to employees of its partner organisations who have knowledge of, or suspect, the wrongdoing. This approach reflects the reality that employees or partner organisations are

December 1988.
[5] Protected Disclosures Act 2000, s. 1(i).
[6] Whistleblower Act, 2006, s. 1(1)(d).

also at risk of retaliation if they endanger the relationship between their own employer and its partners. Here again, we believe the term 'partnership' should be expressly defined, in a broad manner. The definition should include all forms of substantial cooperation between two institutions, whether or not it is based on a contract or required by law.

The Draft Law does not offer any protection to persons who are outside an employer-employee relationship but are still at risk of retribution. This category includes former employees, volunteers, students, independent consultants and family members. All of these persons may also have knowledge of wrongdoing by an institution which they feel unable to disclose without adequate legal protection. It is true that most existing whistleblowing laws do not protect such persons, but we nevertheless recommend extending the scope of the Draft Law to cover them.

Finally, to benefit from the Draft Law's protection, a person must be acting without "hatred, jealousy or misunderstanding" or intent to discredit. This is similar to the condition found in many whistleblowing laws (including those of South Africa, Ghana and Uganda) that disclosures must be made 'in good faith'.

Clearly, a person who discloses wrongdoing out of an honest concern for the public interest is entitled to more respect than one who acts for self-interested reasons. The reality, however, is that in most cases a person's reasons for becoming a whistleblower cannot be objectively determined, and they may include a mixture of noble and more selfish motives.

The risk of requiring good faith is that whistleblowing may be discouraged if employees are afraid that their motives will be called into question. In Britain, the Shipman Inquiry, which investigated how a doctor was able to murder over 200 of his patients before being caught, recommended removing the 'good faith' requirement from the Public Interest Disclosure Act. It warned that if a member of Shipman's staff who personally disliked him had suspected his conduct, that person would not have enjoyed the protection of the Act.[7]

Moreover, even if a whistleblower does act for selfish reasons, such as a desire to gain promotion, the information he or she discloses may still be of significant benefit to the public. A more rational and objective approach, therefore, is to require that the whistleblower *has good reason to believe* that the disclosure he or she is making is in the public interest, rather than requiring that the person's *actual* motive is to serve the public interest.

Ruling out financial rewards for whistleblowing, as Article 9 does, can be an appropriate approach to help ensure the public interest nature of whistleblowing. On the other hand, some countries have gained positive experiences with laws which offer a financial reward for exposing corruption or waste. In the United States, the False Claims Act allows individuals who file successful claims on behalf of the government to take home up to 30% of the amount of money they retrieve for the government. The US Government estimates that US $21.6 billion were recovered in this way between 1987-2008.[8]

[7] The Shipman Inquiry, at 11.32. See http://www.the-shipman-inquiry.org.uk/5r_page.asp?id=4667.
[8] See http://www.taf.org/FCA-stats-DoJ-2008.pdf.

Recommendations:

- The Whistleblower Law should cover not only disclosures relating to criminal behaviour, but also other forms of wrongdoing, including violations of rules and ethical norms, abuses, mismanagement, and failures to act against threats to public health, safety, the environment or human rights.
- The term 'institution' should be defined broadly in the Whistleblower Law, and should include any organisation that employs persons, regardless of whether it is incorporated.
- The term 'partnership' should be defined broadly in the Whistleblower Law, and should include all forms of substantial cooperation between two institutions, whether or not it is based on a contract or required by law.
- The Whistleblower Law should apply to persons who are outside an employer-employee relationship but are still at risk of retribution when making public interest disclosures, such former employees, volunteers, students, independent consultants and family members of employees.
- Rather than focusing on the good faith of an employee making a disclosure, the law's protecting should apply when an employee believes, with good reason, that the disclosure he or she is making is in the public interest.

2.2. Procedure for making a disclosure

Overview

A whistleblower may make a report either orally or in writing, or in any other form not prohibited by law (Article 6). The institution which receives the information must then draw up a report, detailing the relevant facts, the responsible person(s), the place, time, and a number of other relevant facts (Article 11).

Public institutions are required to appoint an employee possessing suitable competence and integrity to receive public disclosures (Article 13). This person then provides the report to the institution's head or a person designated by the head (Article 15). If however a public institution receives information regarding an issue outside its own sphere of responsibility, it must transfer the information to the competent institution, including the identity of the whistleblower if that has been disclosed (Article 10).

Analysis

The Draft Law's provisions on how to make a disclosure are rather short on detail and this is one of the weaker aspects of the proposal.

The requirement for each public institution to appoint a suitable person to receive disclosures is positive. This should make it easy for prospective whistleblowers to follow the correct procedure. It would be a good idea to require this official to ensure that a whistleblower who makes his or her disclosure orally agrees to the written summary drawn up by the official. The official should also provide the whistleblower with an acknowledgment in writing of the receipt of the disclosure.

The law is silent on who should receive disclosures in private institutions. We suggest that either private institutions should be required to appoint a 'go-to person' in the same way as public institutions are, or the law should require private institutions to draw up their own procedures for handling disclosures by whistleblowers. Private institutions with only a very small number of employees could be exempted from this duty.

The Draft Law contemplates only the possibility of internal disclosures. In most cases, internal disclosure is indeed the most appropriate route, as properly managed organisations have an interest in identifying and correcting problems in their own operations.

Most whistleblowing laws recognise, however, that there are situations in which an external disclosure is appropriate or even necessary. This may be the case where an internal disclosure has previously failed to solve the problem; where the wrongdoing is exceptionally serious; or where the person who wishes to make the disclosure has good reason to believe that an internal disclosure will lead to retribution or destruction of evidence.

Uganda's Whistleblowers Protection Act contains the following provision:

> External disclosures maybe made in the following instances—
> (a) where the complaint does not pertain to the whistleblower's employment;
> (b) where the whistleblower reasonably believes that he or she will be subjected to occupational detriment if he or she makes a disclosure to his or her employer;
> (c) where the whistleblower reasonably believes or fears that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer; or
> (d) where the complaint has already been made and no action has been taken or the whistleblower reasonably believes or fears that the employer will take no action.[9]

The South African Law sets similar conditions, but also permits an external disclosure where the employee has a reasonable belief "that the impropriety is of an exceptionally serious nature". We believe the Rwandan law should permit external disclosures under similar circumstances.

External disclosures can be made either to independent public bodies with a relevant mandate (such as an anti-corruption commission), or to the media. Disclosure to the media is the most far-reaching step and it is appropriate to permit this only as a last resort, when the wrongdoing is serious and neither an internal disclosure nor an external disclosure to a public body is capable of addressing it effectively.

We recommend including a list of public bodies in the law to which external disclosures may be made, when the disclosure's subject matter falls within their sphere of responsibility. By way of example, the Ugandan law lists the following bodies:

> (a) the Inspectorate of Government;
> (b) the Directorate of Public Prosecutions;
> (c) the Uganda Human Rights Commission;
> (d) the Directorate for Ethics and Integrity;
> (e) the office of the Resident District Commissioner;
> (f) Parliament of Uganda;
> (g) the National Environment Management Authority;

[9] Whistleblowers Protection Act, 2010, s. 4(2).

> (h) the Uganda Police Force.[10]

Canada's whistleblowing law contains an example of a rule for disclosures to the media. It permits such a disclosure if it is not prohibited under another act, and:

> [….] there is not sufficient time to make the disclosure under those sections and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that
>
> (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or
> (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.[11]

Recommendations:

- When an employee presents a disclosure in oral form, the public official who reduces it to writing should be required to ascertain that the employee agrees with the summary.
- The public employee appointed to receive disclosures should be required to acknowledge receipt of a disclosure in writing.
- The Whistleblower Law should require private sector institutions to appoint a person to receive disclosures, or should require them to put their own whistleblowing procedures in place. An exception can be made for small organisations.
- The Whistleblower Law should recognise the possibility of making an external disclosure to one or more public bodies in cases where an internal disclosure is not an adequate solution.
- The Whistleblower Law should further recognise the possibility of an external disclosure to the media, as a last resort.

2.3. Protection of the whistleblower

Overview

The Draft Law allows a person who discloses information to do so anonymously (Article 7). Public institutions are required to have reasonable procedures in place to protect the identity of whistleblowers who do not make their report anonymously, including the possibility to receive them in secret (Article 12). Each whistleblower is assigned an anonymous code which is listed on the report of his or her disclosure, and the list identifying which code belongs to which whistleblower can be consulted only by the public official in charge of receiving disclosures, the institution's head or a person designated by him or her (Article 14). If whistleblowers are summoned to testify in court, they are identified using the code and are heard *in camera* without any cross-examination (Article 17).

A person making a protected disclosure cannot be held liable at civil, criminal or administrative law, provided he or she acted in good faith (Article 16). Moreover, a manager who imposes an 'administrative sanction' on an employee in retaliation for

[10] *Id.*, s. 4(3).
[11] Public Servants Disclosure Protection Act 2005, c. 46, §16.

making a protected disclosure faces prosecution under the Law on the Leadership Code of Conduct (Article 21).

Analysis

We welcome the fact that the Draft Law on the one hand permits anonymous reports, but on the other hand encourages whistleblowers to identify themselves by offering guarantees that their identity will be effectively protected. Anonymous reports pose a number of problems: they are more difficult to investigate, the whistleblower cannot be protected as easily and, importantly, they do not contribute to an open and healthy organisational culture.

On the other hand, we believe the guarantee of confidentiality the draft law offers to whistleblowers goes too far. In some cases, the whistleblower's allegation cannot be effectively or fairly investigated if his or her identity is to be kept secret. If the allegation is serious, it may be proportionate to lift the whistleblower's confidentiality. New Zealand's Public Disclosures Act attempts to strike a balance as follows: it requires the person who receives the disclosures to "use his or her best endeavours not to disclose" identifying information unless it is "essential to the effective investigation, essential to prevent risk to public health or public safety, or it is essential having regard to the principles of national justice."[12] In our view, whistleblowing which results in criminal prosecution of another person is a clear example of a situation in which disclosing the whistleblower's identity may be necessary. A fair trial will often not be possible if the defendant is prevented from discrediting or cross-examining the accuser. Whistleblowers should be permitted to testify anonymously only if they meet the ordinary requirements for an anonymous witness, such as a serious fear for their safety.

The heart of any whistleblowing law is a credible guarantee that whistleblowers will be protected from retribution of any kind. In this regard, Article 16 of the draft Whistleblower Law, which promises immunity from criminal, civil and administrative process to good faith whistleblowers, is positive, but not sufficient.

The problems related to the requirement of 'good faith' were discussed above in section 2.1.

Being dragged into court will in most cases not be the foremost fear of someone reporting wrongdoing in their organisation. Whistleblowers are more likely to face subtle retribution, such as being refused promotion or a pay rise, being discriminated compared to other employees or facing harassment or intimidation. Article 21 of the draft law is unlikely to prove effective against this type of behaviour, both because managers can only be prosecuted for imposing 'administrative sanctions' – a vague term, which presumably does not include subtle forms of discrimination -, and because it will usually be very difficult for a prosecutor to prove, to the standard required for a conviction, that the manager's treatment of the employee is a direct result of his or her decision to blow the whistle.

It is a better idea to enable the employee to take legal action himself or herself against instances of perceived retaliation. The South African law allows an employee to take legal action over the following types of behaviour:

[12] Public Disclosures Act, §19.

a) being subjected to any disciplinary action;
b) being dismissed, suspended, demoted, harassed or intimidated;
c) being transferred against his or her will;
d) being refused transfer or promotion;
e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
f) being refused a reference or being provided with an adverse reference, from his or her employer;
g) being denied appointment to any employment, profession or office;
h) being threatened with any of the actions referred to paragraphs (a) to (g) above; or
i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.[13]

Importantly, the South African law also reverses the burden of proof. Where a whistleblower has suffered one of the detriments listed above, it is up to the employer to prove that its actions were not motivated by a desire to retaliate against the employee.[14] We consider this an example of good practice.

A court which hears a case brought by a whistleblower should have the power to issue an interim injunction, allowing the employee to return to his or her job pending the case. It should also have the power to order the employer to undo the detriment, or, where this is not possible, awarding full compensation for all lost past and future income and suffering.

Recommendations:

- The Whistleblower Law should recognise appropriate exceptions to the duty to withhold the identity of whistleblowers.
- Whistleblowers should not be entitled to testify anonymously outside of the circumstances recognised in the ordinary law of criminal procedure. Article 17 should be deleted.
- Whistleblowers should be empowered under the law to take legal action against retribution, which should be broadly defined to include all types of job sanctions, harassment, loss of status or benefits, and other detriments. The employer should carry the burden to prove that the detriment was not imposed in retaliation for the disclosure.
- The law should enable employees to seek interim relief to return to the job while their case is pending. In cases where the employee cannot realistically return to his or her job, the law should provide that full compensation can be awarded for all lost past and future income and suffering.

2.4. Sanctions for 'bad faith' disclosures

Overview

Articles 18-20 of the Draft Law make it a criminal offence to make a disclosure in bad faith. Bad faith is defined in Article 2(iv) as disclosing information "with intention of deformation, devaluation and being un honest to an individual or institution". The French language version suggests that 'deformation' is a translation error and the intended word is 'defamation'.

[13] Protected Disclosures Act, s. 1(vi).
[14] *Id.*, s. 4(2)(a).

Article 19 applies to persons in a position of leadership, who face a prison sentence of up to three years. Article 18 applies to current and former employees, who may be jailed for two years. All other persons may be jailed up to one year, pursuant to Article 20. In all cases, a substantial fine may be imposed as well as a prison sentence.

Analysis

The penal provisions of Articles 18-20 are the most problematic aspect of the Draft Law. Their effect is to largely undo the assurances and encouragement offered to employees elsewhere in the law. How likely is a person to become a whistleblower for simple patriotic reasons, if he or she risks being accused by management of acting with 'defamatory intent' – a vague charge which is difficult to defend – and going to prison for a substantial amount of time?

Clearly, an employee who discloses information which he or she knows to be false, in order to harm the reputation of a natural or legal person, should not be immune from legal action. Indeed, the draft law would not protect such a person. However, we assume that there is already a defamation provision in Rwanda's civil code, which would allow the victim of a knowingly false accusation to sue for damages. Introducing a series of vaguely drafted new offences into this law can only have the effect of discouraging, rather than promoting public interest disclosures.

Recommendations:

- Articles 18, 19 and 20, which criminalise bad faith disclosures, should be deleted.

APPENDIX:

LAW N°…OF…RELATING TO THE PROTECTION OF WHISTLEBLOWERS of RWANDA

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LAW N°…OF…RELATING TO THE PROTECTION OF WHISTLEBLOWERS

We KAGAME Paul President of the Republic,

THE PARLIAMENT HAS ADOPTED AND WE SANCTION, PROMULGATE THE FOLLOWING LAW AND ORDER IT BE PUBLISHED IN THE OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA.

THE PALIAMENT:
The Chamber of Deputies, in its session of ……..;

The Senate, in its session of……..;

Pursuant to the Constitution of the Republic of Rwanda of 04 June,2003 as amended to this date especially in its articles 32, 47, 62, 66, 67, 88, 89 90, 92, 93, 94, 95, 108, 118, 182 and 201;

Pursuant to the organic law N° 61/2008 of 10/09/2008 establishing the leadership code of conduct ;

Pursuant to the law N° 25/2003 of 15/08/2003 as modified by law N° 17/2005 of 18/08/2005 providing for the organisation and functioning of the Office of the Ombudsman;

Pursuant to the law N° 23/2003 of 07/08/2003 relating to preventing, fighting and sanctioning corruption and related offences;

Pursuant to the law N°12/2007 of 27/03/2007 relating to public procurement;

Pursuant to the law N°15/2004 of 12/06/2004 relating to evidence and its production especially in its article 128;

Pursuant to the law N°47/2008 of 09/09/2008 on prevention and penalising the crime of money laundering and financing terrorism;

ADOPTS:

Chapter one: General provision

Article One: The purpose of this law

This law aims to promote general interest by protecting persons who disclose information relating to offences, misconduct and maladministration from public and private institutions.

Article 2: Definition of key terms

(i) **Disclosure**: oral or written information that someone knows, suspects or of which he/she had been informed concerning infractions, misconduct and maladministration related to a public or a private institution.

(ii) **Whistleblower:** any body who discloses the information that he/she knows, suspects or of which he/she had been informed concerning crimes, misconduct and maladmistration related to a public or a private institution.

(iii) **infraction**: act or omission sanctioned by penal code and other laws that sanction specific crimes including:
- Corruption and other related offences;
- Money laundering;
- infractions related to the conduct of leaders;
- infractions related to public procurement;
- infractions related to taxes and revenues;
- infractions related to exploitation and management of land;
- infractions related to conservation, protection and promotion of environment
- other infractions.

(iv) **Bad faith:** Ways of disclosing information with intent of deformation, devaluation and being un honest to an individual or an institution.

(v) **Security code:** Any sign that substitutes identifications of an informer is put on information text.

Chapter II: Whistleblowers

Article 3:Whistleblowing in general

An employee of public, private institution or any other person may disclose information provided for in article 2 of this law.

Article 4: Disclosure of information related to the institution where an employee works

Any employee of public or private institution may disclose information provided for in article one of this law committed or presumed to have been committed in institution where he/she is working.

Article 5: Disclosure of information related to the institution that has partnership with an entity where an employee works from

Any employee of public or private institution may disclose information provided for in article one of this law committed or presumed to have been committed in institution which have patternship with the institution where he/she works.

Chapter III: Conditions of whistleblowing

Article 6: Methods used in whistleblowing

The person who discloses information may do it verbally, in writing or any other way which is not contrary to the law.

Article 7: Disclosure of identification

The person who discloses information may/not disclose his/her personal identification.

Article 8: Interdiction related to whistleblowing

The person who discloses the information must do it without basing on hatred, jealousy or misunderstanding which might be existing between the person who discloses the information and the one who is being reported or doing it for oneself or for others with intent of discrediting someone or an institution.

Article 9: Award to the whistleblower

Notwithstanding other laws providing an award to whistleblowers, in this law, disclosing information shall be done on basis of nationalism and protection of general interest.

Chapter IV: Institutions receiving disclosures

Article 10: Government institutions that receive information

A public institution receives disclosure which is in its attributions or powers. A public institution which receives disclosures which are not in its attributions may refer the disclosure to the concerned public institution. When information said above is transmitted by the person that has revealed his/her identifications, the body which receives such information out of its competence, transfer it including identities of that person who disclosed it.

Article 11:Ways of receiving information

The Institution which received information must put them in writing; the writing must be detailed with the basis of act committed, the author of such and his/her accomplice(s), place of commission, who it was exercised and reasons to why it was committed if there are possibilities of identifying them.

Chapter V: Ways of protecting whistleblowers

Article 12: **Mechanisms to protect whistleblowers**

A public institution must establish reasonable procedures of protecting whistleblowers including their secret reception and the filing of disclosures by using a security code.

Article 13: Employee in charge of receiving public disclosures

Every public institution must ensure that there is employee(s) in charge of receiving public disclosures. He/She must have the competence, the ability and the integrity required for this duty.

Article 14: **Secrecy of information**

The file of information received is numerated with a security code corresponding to one of the informer registered in the list of whistleblowers. The list is archived in a secrecy manner, but it can be announced with one in charge of information or head of such institution or any other employee designated by the head of the institution.

Article 15: **Report submission**

An employee in charge of receiving informations gives report to the head of an institution or other employee designated to that work.

Article 16: **Protection from prosecution of whistleblower**

Employee or any other person is not liable, civilly, criminally or under administrative process, for making public interest disclosure when he/she did it in a good faith.

Article17: **Summon to appear before justice**

A whistleblower may be summoned before justice confidentially, using a security code and should be interrogated in camera without cross-examination.

Chapter VI : Sanctions

Article 18 : Sanctions to impose on an employee of public or private institution who disclosed information with bad faith

In case **a** person who disclosed information contrary to article 8 of this law is an employee or former employee of an institution, he or she shall upon conviction, be sentenced to an imprisonment between two (2) months to two (2) years and a fine between one hundred thousand (100,000) to one million (1,000000frw) Rwandan francs or one of the two penalties.

Article 19: **Sanctions to a leader who disclosed the information with bad faith**

In case a person who disclosed information contrary to article 8 of this law, holds a leadership position, he or she shall upon conviction, be sentenced to an imprisonment between six (6) months to three (3) years and a fine between two hundred thousand (200,000) to five million (5,000,000) Rwandan francs or one of the two penalties.

Article 20: Sanctions to any person who disclosed the information with bad faith

Any other person who discloses information contrary to article 8 of this law, he or she shall upon conviction, be sentenced to an imprisonment between eight (8) days to one (1)

year and to a fine between fifty thousand (50,000) to five hundred thousand (500,000) Rwandan francs or one of the two penalties.

Article 21: Punishment to a leader who sanctioned an employee who disclosed the information

Any leader of institution who shall provide administrative sanction to an employee of the institution he/she is heading due to public interest disclosure(s) made by the employee shall be sanctioned in accordance with the provisions of the Law on the leadership code of conduct.

Chapter VII: Final provisions

Article 22: **Repealing provision**

All prior legal provisions contrary to this Law are hereby repealed.

Article 23: Commencement

This law shall enter into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

Done at Kigali on……

KAGAME Paul
The President of the Republic

MAKUZA Bernard
The Prime Minister

Seen and sealed with the Seal of the Republic:

KARUGARAMA Tharcisse
The Minister of Justice